United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2598

To be argued by
STEVEN A. SCHATTEN

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-2598

UNITED STATES OF AMERICA,
Appellee,

—v.—

DANIEL REID and THEODORE E. THOMAS, JR.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

PAGE

PAGE

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Daniel Reid and Theodore E. Thomas, Jr. appeal from judgments of conviction entered on October 29, 1974, after a six-day trial before the Honorable William C. Conner, United States District Judge, and a jury.

Superseding Indictment 74 Cr. 968,* filed October 15, 1974, charged Reid and Thomas in seven counts with assaulting a Federal officer with a deadly weapon, a revolver (18 U.S.C. § 111) (Count One); the wounding of Special Agent Patrick Shea, as lawful custodian of Government property in effecting a robbery of property of the United States, namely, a revolver (18 U.S.C. § 2114) (Count Two); unlawful use of a firearm in the commission of a Federal felony (18 U.S.C. § 924(c)) (Count Three); robbery of property of the United States (18 U.S.C. § 2112) (Count Four); theft of Government property valued in excess of $100 (18 U.S.C. § 641) (Count Five); transportation of a stolen firearm in interstate commerce (18 U.S.C. §§ 922(i),

* This indictment superseded Indictment 74 Cr. 806, filed August 14, 1974.

914(a)) (Count Six); and transportation of a stolen motor vehicle in interstate commerce (18 U.S.C. § 2312) (Count Seven).

Trial commenced on October 22, 1974 and ended on October 29 with a guilty verdict as to both defendants on Counts One through Four and Counts Six and Seven, and a not guilty verdict on Count Five.

On December 5, 1974, Judge Conner sentenced Reid to concurrent terms of imprisonment for six years on Count One, 25 years on Count Two, six years on Count Three, three years on Count Four, two years on Count Six and two years on Count Seven. Thomas was sentenced to a term of imprisonment for eight years on Count One, 25 years on Count Two, eight years on Count Three, three years on Count Four, two years on Count Six, and two years on Count Seven, all to run concurrently.

Both defendants are presently serving their sentences.

Statement of Facts

The Government's Case

Through the testimony of Special Agent Patrick Shea of the Drug Enforcement Administration ("DEA"), two eye witnesses to the events taking place on the street, and several New York City Police Officers who conducted the investigation, the Government established that at about four o'clock on the afternoon of August 1, 1974, Shea was in a barber shop at 5705 Mosholu Avenue in the Bronx getting a haircut during a late lunch period (Tr. 61-62). Shea heard a commotion in the nearby Mosholu Liquor Store and went inside, taking out his DEA badge (GX 3) and drawing his Government-issued service revolver (GX 1) (Tr. 64).

On entering the liquor store, Shea observed Daniel Reid beating the liquor store proprietor, John McArdle,* with a broken bottle.** (Tr. 66-67, 127). Shea shouted at Reid "Freeze, police," and Reid stood up and faced Shea. Shea then saw Theodore E. Thomas, Jr., in the liquor store standing adjacent to the counter.*** Shea told Thomas to freeze, but Thomas walked over close to Shea. Shea testified that while his attention was fixed on Reid, Thomas, holding a long-barreled automatic pistol, got the drop on Shea and told Shea to give Thomas his revolver. (Tr. 67-68) Thomas took Shea's government-issued service revolver (GX 1) and his DEA badge, and ordered Shea to get down on the floor. As Shea was lying on the floor Thomas shot Shea in the right forearm shattering the radial bone to the point where 80 percent of the bone was damaged. (Tr. 69, 74.) Shea cried at Thomas, "You shot me", and Thomas responded, "I am going to kill you", and fired another shot at Shea (Tr. 69).

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* As Reid correctly notes in his brief, at page 3, McArdle had been stabbed repeatedly with an ice pick by the perpetrators. (Tr. of December 5, 1974, p. 35). McArdle died on August 29, 1974. However, murder charges were never brought, and we are advised that Reid and Thomas were sentenced to six years imprisonment on their guilty pleas to the charges brought against them in State Court (see Thomas Br. at 26n.). It is in this light that this Court can appraise Thomas' contention (Brief at 26) that "it is the State which will protect Agent Shea's interests, as indeed it has done in this case." Of course, as the District Court recognized, it is not Agent Shea's interest, but the public interest in encouraging such intervention, which is of paramount importance in this case.

** The defendants stipulated that a felony or violent misdemeanor was being committed in the liquor store at the time Shea entered and that this was apparent to Shea. (Tr. 210.) McArdle had sustained head wounds. (Tr. 141.)

*** GX 10C and 10B are photographs of the liquor store taken on the date of hold-up from the front of the store and from the rear of the store looking to the street, respectively. The "X" on GX 10C indicates the location where Reid was beating McArdle with the broken bottle; the "X" and the "O" on GX 10B point to the locations of Thomas and Shea when Thomas robbed Shea's gun and shot Shea. (Tr. 70-71).

Shea testified that he observed the two defendants for approximately a minute inside the liquor store. (Tr. 125) Reid and Thomas, who left his eye glasses (GX 11)* in the liquor store, fled the liquor store, and Shea followed in pursuit.

Thomas fired another shot at Shea while they were on the street. (Tr. 72). Then, with much difficulty, Reid and Thomas got into a maroon 1973 Buick station wagon parked three or four car lengths from the liquor store; Shea watched Reid and Thomas on the street for about one-half minute prior to their gaining entry into the automobile (Tr. 125). Reid and Thomas also experienced substantial difficulty in moving the car from the parking spot, during which time Shea had observed them for an additional 20-25 seconds (Tr. 73, 126). The Buick station wagon, with Thomas driving, attempted a U-turn at a high speed, collided with a turquoise automobile parked on the opposite side of the street, and drove off. (Tr. 72-73). Despite his wound, Shea got into his DEA automobile, turned on the siren and followed a short distance, but Reid and Thomas eluded him (Tr. 73-74, 134).

At about 6:30 P.M. that evening, the maroon Buick station wagon driven by Reid and Thomas was recovered at a parking lot adjacent to a body and fender repair shop located at 244 East 128th Street in Manhattan, several miles away from the liquor store. An analysis of paint scrapings and a rubber bumper tarnished with turquoise paint confirmed that in making the U-turn in front of the liquor store, the 1973 maroon Buick station wagon had struck and dented the turquoise automobile parked across

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* GX 11C and 11D are documents relating to the issuance of the eyeglasses to Thomas. Winona Arnold, who knew Thomas during 1971 and who issued eyeglasses to Thomas in September, 1971, and an optician, Dr. Crohn, testified that GX 11 was Thomas's eyeglasses. (Tr. 275-281, 284).

the street (Tr. 174-175). A bottle of Cold Duck (GX 20), with the Mosholu Liquor Store label, was recovered in the bushes a short distance away from the 1973 maroon Buick station wagon (Tr. 242, 256-57; GX 12F, 12B). Thomas' fingerprints were found on the 1973 maroon Buick station wagon (Tr. 248-250, 290-291, 300-301).

Three days later, on August 4, 1974, after having been stopped by Patrolman Terry Boland of the Ohio State Highway Patrol, Reid and Thomas drove off in a stolen Pontiac Grand Prix and, after a chase at speeds over 100 miles per hour, were captured. (Tr. 408-411) Reid threw Shea's government-issued revolver, which had been robbed at the liquor store (GX 1), out of the window of the Pontiac Grand Prix. (Tr. 411) Reid and Thomas were then arrested and placed in custody by Patrolman Boland.

John Barry, who had been working at the Winston Churchill Garage, identified Reid as the man who, together with an accomplice, had stolen the Pontiac Grand Prix at gunpoint from the Winston Churchill Garage in the Bronx on July 29, 1974 (Tr. 386-388).

The Defense Case

Neither Reid nor Thomas took the stand.

In an effort to rebut the credibility of the descriptions furnished by Agent Shea and John Barry of the Winston Churchill Garage, Reid put on Damaris Febres, a friend of his, who testified that Reid was her sister-in-law's boyfriend (Tr. 462-463). Miss Febres testified that she saw Reid at 5:30-6:00 in the early evening of August 1, 1974 at her home at 455 Jackson Avenue in the Bronx, and that he had a mustache, a little beard and an Afro. (Tr. 459). On cross-examination, Miss Febres conceded that on that occasion Reid was looking for Thomas. She further testified that, although she had known Reid since January, 1974 and he had allegedly come to her home four or five times a week

(Tr. 476), she did not know what Reid did for a living, how old he was, where he lived, what hours he worked, or what she and Reid talked about. (Tr. 482). Indeed, she testified that she did not know "anything at all about Mr. Reid." (Tr. 482).

The Government's Rebuttal Case

On rebuttal, the Government called Detective Charles Minch who took a photograph of Reid on August 6, 1974 (GX 28). Minch testified that on August 6, 1974 Reid had a slight mustache and short hair. (Tr. 406).

ARGUMENT

POINT I

Count Two—charging defendants with having assaulted and having wounded Agent Shea in the robbery of the Government-issued service revolver—properly charges an offense prohibited by Title 18, United States Code, Section 2114, since, on its face and in the light of its legislative history, that section governs assaults and woundings during robberies not only of postal employees but of all lawful custodians of Government money and property.

Reid and Thomas contend that the robbery and shooting of Special Agent Shea did not violate Section 2114 of Title 18, United States Code, because of the absence of any nexus between their offense and the Postal Service. Their claim should be rejected.

It is uncontested in this case that Special Agent Shea, a Special Agent of the Drug Enforcement Administration, was the lawful custodian of property of the United States, specifically his Government-issued pistol, and that this property was stolen by Thomas during the course of a robbery he and Reid were perpetrating at the Mosholu Liquor Store. It

is also uncontested that in effecting the robbery of this property from Shea, Thomas shot Shea and wounded him. There also appears to be no contention that *on its face* Section 2114 of Title 18, United States Code, does not apply to the conduct of which Reid and Thomas were convicted. Rather, relying on *United States* v. *Fernandez,* 497 F.2d 730 (9th Cir. 1974), Reid and Thomas urge that Section 2114 is inapplicable to their conduct because legislative history limits the application of that section to robberies and attempted robberies of postal employees.

Before responding to appellants' claim under *Fernandez,* we are obliged to call the Court's attention to the case of *United States* v. *Hanahan,* 442 F.2d 649 (7th Cir. 1971), in which the defendant was convicted under Section 2114 of robbing an Internal Revenue Service office. After affirmance in the Seventh Circuit, Hanahan apparently collaterally attacked this conviction on the ground that Section 2114 was inapplicable to the offense he had committed. The District Court denied relief, and the Court of Appeals, in an apparently unreported judgment, affirmed. When Hanahan raised the issue on application for *certiorari* in the Supreme Court, the Solicitor General filed a Memorandum for the United States which, while asserting that Section 2114 on its face applied to Hanahan's offense, conceded, on the basis of the legislative history, ". . . that Section 2114, as amended, was designed only to cover robberies of post offices and postal employees" and that robberies lacking "some nexus with the postal function" were not within the scope of Section 2114.* (Memorandum for the United States at 2-4).**

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* *Hanahan* and *Fernandez* both deal with the effects of amendments made in 1935 to former Section 320 of Title 18. Prior to the amendments, the statute's scope was limited to robbery and attempted robbery of mail matter. The amendments broadened the statute to include "money or other property of the United States". Section 320 is now Section 2114 of Title 18.

** Copies of the Memorandum for the United States in *Hanahan* are being served on counsel with this brief and will be handed up at oral argument.

In response to the Memorandum for the United States, the Supreme Court granted *certiorari*, vacated the judgment of conviction, and remanded to the Court of Appeals for the Seventh Circuit for reconsideration in light of the suggestion contained in the Solicitor General's Memorandum. 414 U.S. 807 (1973).*

We respectfully submit that the position taken by the Solicitor General in *Hanahan* and by the Ninth Circuit in *Fernandez* is wrong.** In connection with *United States* v.

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* We have been advised by the United States Attorney's Office for the Northern District of Illinois that, upon receipt of the mandate of the Supreme Court, the Court of Appeals remanded the case to the United States District Court for the Northern District of Illinois for consideration in light of the position asserted by the Solicitor General. Thereafter, the District Court resentenced Hanahan as if convicted under 18 U.S.C. § 2112, a procedure suggested in the Memorandum for the United States in the Supreme Court. Hanahan appealed from his conviction, complaining of the action taken by the District Court. This appeal has been argued and is presently *sub judice* in the Seventh Circuit.

We have also been advised by the United States Attorney's Office for the Central District of California, which prosecuted the *Fernandez* case, that *Hanahan* was brought to the attention of the Ninth Circuit before the opinion was filed in *Fernandez*. The Ninth Circuit followed the position taken by the United States in *Hanahan*, but the Court did not allude to it in its opinion.

** Though not cited by appellants, we also call to the Court's attention the case of *United States* v. *Spears*, 449 F.2d 946 (D.C. Cir. 1971). In that case the Court of Appeals did conclude after a review of the legislative history of Section 2114 and its predecessors:

> "The derivation, codification, revision and explanation of what is now 18 U.S.C. § 2114 thus all clearly indicate that the assault proscribed by that section is an assault which forms an integral part of an unsuccessful attempt to rob a mail carrier." *Id.* at 954.

However, the applicability of *Spears* to this case is substantially

[Footnote continued on following page]

Ismael Rivera, Dkt. No. 74-2115 (argued January 14, 1975, now *sub judice*) involving precisely the same issue,* we have written to the Solicitor General requesting that the

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limited by the fact that the issue confronting the Court in *Spears* arose in the context of a postal robbery and involved the defendant's convictions of both an assault with intent to rob under Section 2114 and a completed robbery under the District of Columbia Code. Moreover, the Court of Appeals' examination of the legislative history of the 1935 amendments is not directed to the issue posed in *Hanahan, Fernandez* and this case.

* In the *Rivera* case, Special Agent Frank Tummillo of the Bureau of Narcotics and Dangerous Drugs, while in a motel room posing as a prospective buyer of 15 kilograms of cocaine for $150,000, was shot and killed by Jose Nieves and Jose Matta, who had posed as cocaine sellers, during their attempted robbery of the purchase money. During the course of this attempted robbery Special Agent Thomas Devine, who was the custodian of the funds, was paralyzed by a bullet fired into his spine by Matta. Nieves and Matta were themselves killed by other agents. Ismael Rivera, whom the evidence showed had furnished weapons to Nieves and Matta and who was waiting nearby in the get-away car at the time of the shooting, made his escape and was not apprehended until September 28, 1973.

Indictment 74 Cr. 280, in three counts, was filed in the United States District Court for the Southern District of New York on March 21, 1974. Count One charged Ismael Rivera with the first degree murder of Special Agent Tummillo, Title 18, United States Code, Sections 1111, 1114, and 2. Count Two charged Rivera with wounding Special Agent Devine during an attempted robbery of money and property of the United States, Title 18, United States Code, Sections 2114 and 2. Count Three charged Rivera with assaulting a federal agent with a deadly weapon, Title 18, United States Code, Sections 111, 1114 and 2.

On June 21, 1974, guilty verdicts were returned on all counts. Rivera was sentenced by the Honorable Inzer B. Wyatt, United States District Judge, on August 16, 1974 to life imprisonment on Count One, to run consecutively with concurrent terms of imprisonment of 25 and 10 years imposed on Counts Two and Three.

Other non-postal cases under Section 2114 of which we are aware are cited in *Fernandez* at 497 F.2d at 739.

position taken by the United States in *Hanahan* be reconsidered in the light of the arguments which follow,* and we have so advised the Judges of the Court before whom *Rivera* is pending. We have also advised the Solicitor General of the pendency of this appeal.

In our view, it is clear beyond any doubt that on its face Section 2114 covers the offense here committed. Shea, was assaulted and wounded during this robbery of his Government-issued revolver, which was "property . . . of the United States", and Shea had "lawful custody" of the revolver. The Memorandum for the United States in *Hanahan* seems to concede as much (at 2). And there is nothing whatever in the language of the statute which limits its application to postal service robberies.

The Ninth Circuit in *Fernandez,* and the United States in its memorandum in *Hanahan,* nonetheless found it necessary to proceed to an examination of the legislative history of the 1935 amendments of Section 2114's predecessor section, former Section 320 of Title 18, to determine whether Congress meant what it quite unmistakably said. The result of that examination is a conclusion that Congress intended Section 2114—despite its crystal clear language to the contrary--to be limited to crimes related to the Postal Service.

We believe that this construction of Congressional intent is mistaken. We also submit that, whatever the legislative history shows, its use here to limit the scope of the Section

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* The action of the Supreme Court in *Hanahan* is, of course, no precedent. Nor are the Solicitor General's views binding on this Court. On the other hand, we do not believe that the United States Attorney ought to take a position contrary to one recently asserted by the Solicitor General in the Supreme Court without leave of the Solicitor General to do so.

is inconsistent with the usual manner of construing federal statutes.

Taking the latter question first, we note that, as Mr. Justice Jackson wrote, concurring in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951): "Resort to legislative history is only justified when the face of the Act is inescapably ambiguous . . ." See also *Mulad* v. *Riddell*, 383 U.S. 569, 571-572 (1966); *Commissioner* v. *Brown*, 380 U.S. 563, 571-572 (1965); *Holtzman* v. *Schlesinger*, 484 F.2d 1307, 1314 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).* "It must be assumed that the legislative purpose is expressed by the ordinary meaning of the words used in the statute . . . [citations omitted] and where they have a basic and usual sense, they require no resort to legislative history . . . [citations omitted]. The proper function of legislative history is to solve and not to create an ambiguity . . . [citations omitted]." *United States* v. *Blasius*, 397 F.2d 203, 205-206 (2d Cir. 1968), *cert. dismissed*, 393 U.S. 1008 (1969).

The Memorandum for the United States in *Hanahan* in no way deals with the propriety of the use of legislative history to limit the scope of a statute which is as unambiguous on its face as Section 2114. The Ninth Circuit in *Fernandez* nods to the need for ambiguity—"Our reading of the statute leads us to conclude that the wording employed in amendment of its predecessor [footnote omitted] in 1935 is sufficiently ambiguous to raise the question of legislative history", 497 F.2d at 739-740—but its *ipse dixit* on the ambiguity of the statute is hardly persuasive. Indeed, it is difficult to conceive of a clearer criminal statute, and the Memorandum for the United States in *Hanahan* seems to agree with that view.

Even assuming *arguendo* that resort to the legislative history were proper to determine the scope of Section 2114, we submit that the restriction of its application to crimes

involving the Postal Service is unwarranted by the legislative history. To be sure, *Fernandez,* 497 F.2d at 740, and the Memorandum for the United States in *Hanahan* (at 3) quote the same statement, made on the House Floor, that the only purpose of the bill was to extend the same penalties for robbery and attempted robbery of the money or property of the United States "in the custody of its postal officials" as protected mail matter by then existing Section 320 of Title 18. It is also true that the amendments in 1935 to the predecessor statute of Section 2114, 18 U.S.C. § 320, which then covered only robbery of mail matter, were proposed by the Post Office Department.

On the other hand, during the same brief debate at which the statement given such prominence in *Fernandez* and the Memorandum for the United States in *Hanahan* was made, another Congressman gave a wholly different statement of the purpose of the amendments:

> "Mr. Wolcott. Replying to the gentleman from Ohio, I doubt whether the Federal Government would have jurisdiction to enact legislation making it a felony to enter a persons home for the purpose of committing burglary or any other offense. *This bill is confined to assaults on Federal law-enforcement officers.* For that reason, I have no objection to it. I do not want to see them federalize all the criminal laws of the States, and this bill does not do it; it merely amends existing law with respect to assault with intent to commit robbery." 79 Cong. Rec. 8205 (1935) (emphasis supplied).

Moreover, the House of Representatives report (H.R. Rep. 582, 74th Cong. 1st Sess. (1935) on the bill is entitled "SAFEGUARDING CUSTODIANS OF GOVERNMENT MONEYS AND PROPERTY", and the Senate Report (S. Rep. 1440, 74th Cong., 1st Sess. (1935) on the bill after its passage by the House is entitled "PROVIDING FOR PUNISHMENT FOR THE CRIME OF ROBBING OR

ATTEMPTING TO ROB CUSTODIANS OF GOVERNMENT MONEYS OR PROPERTY". The titles of the reports thus suggest that the Congressional purpose in passing the amendments to former Section 320 was broader than that suggested by the remarks quoted in *Fernandez* and the Memorandum for the United States in *Hanahan*. Both the House and Senate Reports are exceedingly brief and consist of not much more than a statement that the bill's purpose is to provide ". . . for punishment for the crime of robbing or attempting to rob custodians of Government moneys or property . . ." and a letter to the Committee Chairman in the House of Representatives from Postmaster General Farley, who, while asserting the Post Office's need for the legislation, uses the broader language quoted just above as setting forth the purpose of the bill. There is nothing in either report that states that Section 320 as amended was intended to apply only to postal robberies.

The legislative history thus indicates that the legislative purpose in enacting the amendments resulting in present Section 2114 was broader than that stated in the isolated remarks of one Congressman during a brief debate, to which little weight should be attached. *United States* v. *Oregon*, 366 U.S. 643, 648 (1961). In our view, the legislative history supports the broader interpretation rejected in *Fernandez* and in the Memorandum for the United States in *Hanahan*. At the very least the legislative history is ambiguous, and, this being so, the statute itself is the proper source for determining legislative intent. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 412 n.29 (1971).

Moreover, even if the Congressional purpose in enacting the amendments to former Section 320 were as restricted and obvious as is contended, that would still be an insufficient basis on which to preclude the application of Section 2114 to offenses clearly within the scope of the statutory language. That the scope of the statutory language was broader than the legislative purpose does not require restriction of the scope of the statute to less than what its plain language provides. See, *e.g.*, *United States*

v. *Archer,* 486 F.2d 670, 678-680 (2d Cir. 1973); *United States* v. *Kahn,* 472 F.2d 272, 285-286 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973). Moreover, Congress has demonstrated its ability to define offenses involving the Postal Service precisely as such when it has intended to so limit them, e.g., Title 18, United States Code, §§ 1691-1737, and there is no such limitation in Section 2114. *Tibke* v. *Immigration and Naturalization Service,* 335 F.2d 42 (2d Cir. 1964).

There are additional reasons why the broader construction we urge should be applied. First, Section 2114 is the only provision in Title 18 we are aware of which provides an additional penalty for wounding or placing in jeopardy the life of the victim of the attempted robbery, in most cases presumably a federal employee. Section 111 merely provides a lesser penalty triggered by the use of a dangerous or deadly weapon in the course of an assault on a federal officer designated in Section 1114. Second, the limited construction put on Section 2114 in *Fernandez* and the Memorandum for the United States in *Hanahan* works the anomalous result that violent robberies or attempted robberies of postal officials are punishable by twenty-five years imprisonment, but robberies of other federal officials, as here and in *Hanahan,* are punishable under 18 U.S.C. § 2112 by a maximum of fifteen years imprisonment, and then only if completed offenses, not attempts.

In sum, for the reasons herein, the scope of Section 2114 should clearly be held to encompass the assault and wounding of Special Agent Shea in the course of the robbery of the Government revolver under the circumstances here presented.*

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* Reid's attempt to argue that the 25-year penalty provided for in Section 2114 is not mandatory is unpersuasive. *Gregg* v. *United States,* 394 U.S. 489, 490, 493 (1969).

POINT II

The trial court properly permitted Special Agent Shea's in-court identification of Reid and Thomas as the perpetrators of the crimes here charged.

Prior to trial, the Government advised defense counsel and the Court that Agent Shea had been shown a suggestive photographic spread, and a pre-trial hearing was held. *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 913 n.1 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). After the hearing, Judge Conner declined to preclude an in-court identification by Agent Shea of Thomas and Reid as the perpetrators of the crimes charged in the indictment (Hearing Transcript ("H. Tr." 386).

At the preliminary hearing, it was established that Agent Shea saw Reid for a total of one minute and ten seconds, 20-25 seconds "at close range under good lighting conditions" * inside the liquor store during the hold-up and the remainder outside the liquor store at ranges between 20 and 35 feet "in outdoor lighting conditions shortly after 4:00 p.m. on a sunny August 1st, again under conditions where he would be at maximum alertness. (H. Tr. 384-385).

He observed Thomas for a somewhat longer period,** including time when he was being menaced. Agent Shea, as the District Court found, was a well-trained law enforcement official who had been doing narcotics law enforcement work for five years which could involve making identifica-

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* Reid's reference (Br. at 9) to the "dimly-lit liquor store" is in error and not supported by the record. Judge Conner found that there were "good lighting conditions inside the store" (H. Tr. 389), and Shea, at trial, testified that "the lighting conditions were normal," although stating that for a liquor store it was a dimly lit one. (Tr. 91).

** In the Court's opinion (at H. Tr. 383-386), suspect no. 1 refers to Reid while suspect no. 2 refers to Thomas.

tions at long ranges, under weather conditions fair or foul, day or night, and for periods as little as only a few seconds. (H. Tr. 315-317).

On August 8, 1974, shortly after the defendants had been apprehended in Ohio, a Special Agent of the Drug Enforcement Administration visited Shea and showed him two "extremely indistinct" photographs, one of Reid, the other of Thomas, for a total period of 20-to-30 seconds. (Tr. 332, 366-367, 385). Approximately three weeks prior to trial, Shea, in the course of a meeting with his Group Supervisor at the Drug Enforcement Administration in connection with pre-trial discovery, was shown the same two photographs for a period of not more than five seconds to determine if these photographs of Reid and Thomas were the two photographs he had previously been shown. (H. Tr. 333-334, 367). Judge Conner found that as to the photograph showing a profile of Thomas (marked at trial as Thomas Ex. A), "The entire nose area of the person shown cannot be seen. Likewise, the mouth area cannot be seen. All that can be seen of the nose area and the mouth area is an indistinct visualization of what appears to be a moustache and a beard or goatee, or at least an unshaven chin. [T]he picture is so indistinct as to add little or nothing to the opportunity to see an individual at close range under good lighting conditions for a period on the order of a half a minute. (H. Tr. 385). As to Reid's photograph (marked at trial as Reid Ex. A), which likewise portrayed a profile, the Court found that "the portion of the face in the cheek area has excessive lighting and is washed out, while the profile is poorly lit and indistinct and it would add little to the opportunity to see a man at close range from various angles under good lighting conditions for a period of the order of half a minute." (H. Tr. 385-386).

The Government conceded at the hearing that the photographic identification technique used in this case had been impermissibly suggestive. Judge Connor quite justifiably

agreed. However, the Judge also found on the basis of the testimony that Shea had had an ample opportunity to view his assailants on August 1, 1974, and that there was "a very strong independent basis of identification". The motion to suppress an in-court identification by Shea was accordingly denied. (H. Tr. 386).

Judge Conner's ruling was clearly correct. *United States ex rel. Lucas* v. *Regan*, 503 F.2d 1, 4 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3453 (February 18, 1975). *United States* v. *Yanishefsky*, 500 F.2d 1327, 1330-1331 (2d Cir. 1974); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 801 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973); *United States ex rel. Frasier* v. *Henderson*, 464 F.2d 260, 264-265 (2d Cir. 1972); *United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973), *on remand as United States ex rel. Robinson* v. *Vincent*, 371 F. Supp. 409 (S.D.N.Y.), *aff'd*, 506 F.2d 923 (2d Cir. 1974); *United States ex rel. Curtis* v. *Warden*, 463 F.2d 84, 85, 88 (2d Cir. 1972); *United States ex rel. Beyer* v. *Mancusi*, 436 F.2d 753 (2d Cir.), *cert. denied*, 403 U.S. 933 (1971); *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 914-915 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970); *United States* v. *Cox*, 428 F.2d 683 (7th Cir.), *cert. denied*, 400 U.S. 881 (1971). See also *Neil* v. *Biggers*, 409 U.S. 188 (1972). If an identification procedure is impermissibly suggestive, "[t]he effort must be to determine whether, before the imprint arising from the lawful identification procedure, there was already such a definite image in the witness' mind that he is able to rely on it at trial without much, if any, assistance from its successor." *United States ex rel. Phipps* v. *Follette, supra*, 428 F.2d at 915. See also *United States ex rel. Robinson* v. *Zelker, supra*, 468 F.2d at 163. On appeal ". . . great weight must be given to the determination of the judge who saw and heard the witness." *United States ex rel. Phipps* v. *Follette, supra*, 428 F.2d at 915.

Here, to be sure, Agent Shea was shown photographs of his two assailants without their inclusion in a spread containing photographs of other individuals resembling Reid and Thomas. However, even if this display was overly suggestive, Judge Conner's findings that the photographs were indistinct substantially undercuts any suggestion that Shea's in-court identification of the defendants was tainted by the display. Moreover, there are many other substantial factors which fully support Judge Conner's finding that Shea was not in any way influenced by the suggestive form of identification. First of all, Shea was a well-trained law enforcement officer, skilled in the making of identifications. *United States ex rel. Smiley* v. *LaVallee*, 473 F.2d 682 (2d Cir.), *cert. denied*, 412 U.S. 952 (1973). He had an ample opportunity to observe the perpetrators at close range, the liquor store was well-lit, and it was a sunny summer afternoon. *United States* v. *Yanishefsky, supra; Neil* v. *Biggers, supra; United States ex rel. Gonzalez* v. *Zelker, supra; United States* v. *Counts*, 471 F.2d 422, 424-425 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States ex rel. Bisordi* v. *LaVallee*, 461 F.2d 1020, 1024 (2d Cir. 1972); *United States* v. *Fernandez*, 456 F.2d 638, 642 (2d Cir. 1972); *United States ex rel. Cummings* v. *Zelker*, 455 F.2d 714 (2d Cir.), *cert. denied*, 406 U.S. 927 (1972); *United States ex rel. Phipps* v. *Follette, supra; United States ex rel. Rutherford* v. *Deegan*, 406 F.2d 217, 219-220 (2d Cir.), *cert. denied*, 395 U.S. 983 (1969). Furthermore, because he was the victim of the crimes, Shea was motivated to and did observe the perpetrators closely. *United States* v. *Mims*, 481 F.2d 636, 637 (2d Cir. 1973); *United States ex rel. Bisordi* v. *LaVallee, supra*, 461 F.2d at 1024; *United States ex rel. Phipps* v. *Follette, supra*, 428 F.2d at 915. Additionally, less than three months' time elapsed between events at the liquor store, on August 1, 1974, and the time of trial, which commenced on October 22, 1974, when the events were fresh in Shea's mind. Finally, both at the hearing and at trial, Shea was unequivocal in stating that his in-court

identification of Reid and Thomas was positive. (H. Tr. 335; Tr. 127) *United States ex rel. Bisordi* v. *LaVallee, supra,* 461 F.2d at 1024.*

Moreover, in accordance with the suggestion in *United States* v. *Fernandez,* 456 F.2d 638, 641-644 (2d Cir. 1972), the District Court, as part of the charge, gave an instruction regarding the factors to be considered in evaluating an eyewitness identification. (Tr. 625-630). This, coupled with the extensive cross-examination by defense counsel which covered the entire panoply of issues with respect to identification, more than amply protected defendants' rights.**

POINT III

Agent Shea was clearly "engaged in the performance of his official duties" within the meaning of Title 18, United States Code, Section 111, and not on a personal frolic of his own, when he entered the liquor store and took reasonable action, in the course of a felony, in accordance with the provisions of his Agent's Manual.

Thomas complains that Shea was not "engaged in the performance of his official duties", 18 U.S.C. § 111,

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* Even assuming *arguendo* that Judge Conner erred on this point, in view of the overwhelming evidence against the defendants apart from Shea's identification, admission of his testimony was harmless. *United States ex rel. Cummings* v. *Zelker, supra; United States* v. *Abbate,* 451 F.2d 990 (2d Cir. 1971); *United States* v. *Roth,* 430 F.2d 1137, 1140 (2d Cir. 1970), *cert. denied,* 440 U.S. 1021 (1971); *United States ex rel. Phipps* v. *Follette, supra,* 428 F.2d at 916.

** Reid's comments (Br. at 7) with respect to the circumstances during which the Court attempted to find individuals who resembled him are distortions. As the comments at Tr. 34-35 indicate, prior to trial the defendants had advised the Court that they would arrange to have people sit at counsel table. On the day of trial, however, no one was produced. At the request of defense counsel, the Court arranged for the attendance of three black venire men, two of whom the defendants excused, and two black marshals (Tr. 42-44).

when he was assaulted and argues that the conviction on Count One for violation of the cited section should be set aside. The contention is without merit.

Upon hearing the commotion in the liquor store from the neighboring barber shop where he was having his hair cut, Agent Shea entered the liquor store, drew his revolver and his Drug Enforcement Administration Agent's badge, and shouted to Reid, who was then beating the liquor store proprietor, McArdle, over the head with a broken bottle, "Freeze, police." Shea's attempt to stop the hold-up at the liquor store failed, and he was shot and wounded.

The District Court at the time of sentence correctly denied motions addressed to Count One, finding that the Agent's Manual governing the conduct of federal narcotics officers authorizes and instructs narcotics agents who observe a felony or a violent misdemeanor taking place to intervene and to attempt to prevent it. The Court found, and the jury concluded that, "This is what Agent Shea did in this case." (Tr. of December 5, 1974, p. 17.)

Although conceding that Agent Shea's conduct was "in the finest tradition of a law enforcement official" (Thomas Br. 25, 26), as indeed it was, and in accordance with the provisions of the Agent's Manual insofar as it defines an Agent's duty when he sees a State felony or violent misdemeanor being committed in his presence, whether on or off duty * (Thomas Br. 21-22), Thomas urges that Shea should

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* Section 6641.5, the applicable provision of the Agent's Manual, provides "Should an agent happen to witness a State violation (whether he is on or off duty) the Administration expects him to take reasonable action as a law enforcement officer to prevent the crime and/or apprehend the violator. This policy applies only to felonies or violent misdemeanors. It does not apply to traffic violations or other minor offenses."

Even assuming its relevance, Thomas' implication (Br. at 23-24) that the Drug Enforcement Administration could not require the action Shea took here is conclusively answered by Section 1 of Reorganization Plan No. 2 of 1973, Appendix II to Title 5 of the 1970 United States Code, Supplement III (1973),

[Footnote continued on following page]

not be accorded the protections of Title 18, United States Code, Sections 111, 1114 because intervention in State crimes is not what Shea had been "employed to do." However, as the District Court recognized, sound public policy must wholeheartedly mandate the rejection of any such position. Indeed, the purpose of Section 111 "to provide federal officers the protection of the federal courts when they are performing their duties" is clearly applicable here. *United States* v. *Langone,* 445 F.2d 636, 637 (1st Cir.), *cert. denied,* 404 U.S. 915 (1971).

Thomas, however, argues that such duties are limited to situations involving "his Federal duties to arrest for violation of Federal law." (Thomas Br. 26; Emphasis in original). This Court rejected such a claim in *United States* v. *Martinez,* 465 F.2d 79, 81-82 (2d Cir. 1972), holding that since the federal agents involved had probable cause as private citizens under New York Law to arrest Martinez for violation of state law, Martinez was properly convicted under Title 18, United States Code, Section 111, for his assault on the federal agents making the arrest. Previously, in *United States* v. *Heliczer,* 373 F.2d 241, 244-246 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967), this Court held that a federal official's duties clearly go beyond their power to arrest under Federal law. In *Heliczer,* a conviction was upheld under Section 111 for an assault on narcotics agents who were making an arrest for a state law offense arising from a threat against a narcotics informant. In rejecting the contention that Thomas here urges, this Court pointed out:

> "It is apparent, however, that the appellant assumes that the scope of the agents' official duties is coextensive with their power to arrest. But this is not so. Their official duties may cover many functions which have nothing whatever to do with making

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87 Stat. 1091, and by Section 1 to the Appendix to Subpart R of 28 C.F.R. §§ 0.100, *et seq.*, making applicable to employees of the DEA all of the manuals of the Bureau of Narcotics and Dangerous Drugs, which, after June 1, 1971, contained Section 6641.5 of the Agent's Manual.

> arrests. It is true that from time to time in appropriate circumstances they may have a duty to make an arrest, but their power to make it is not a natural incident derived from the catalogue of their duties but must be separately granted by the act of a sovereign. Moreover, the sovereign granting it may be a different one from that which prescribes their duties, as in the present case. 'Engaged in * * * performance of official duties' is simply acting within the scope of what the agent is employed to do. *The test is whether the agent is acting within that compass or is engaging in a personal frolic of his own.*" 373 F.2d at 245 (emphasis supplied); see also 373 F.2d at 244-245 n. 2.

Under the circumstances here presented, Agent Shea's action in accordance with the provisions of the Agent's Manual, in endeavoring to terminate the savage hold-up and the beating of the liquor store proprietor, during the course of which actions he was shot and threatened with death, "is a far cry from a personal frolic." * *United States* v. *Cho Po Sun*, 409 F.2d 489, 491 (2d Cir.), *cert. denied*, 396 U.S. 864 (1969).

In sum, the Government submits that at the time of the assault and wounding of Agent Shea, it is clear beyond question that Shea was clearly engaged in the execution of his official duties.**

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* Thomas's quarrel (Br. at 24-25 n.) with the Court's charge (at Tr. 596-598), which used *in haec verba* the "personal frolic" test promulgated by this Court's decisions, is utterly without merit. Moreover, no exception was taken to this charge.

** In attempting to criticize the prosecutor's summation insofar as it related to Section 111, Thomas's Brief (at 9, 22 n.) quotes the prosecutor out of context and omits a relevant passage. Thus at page 563, the prosecutor stated:

> "The evidence, the issue that you are faced with, is whether Agent Shea was assaulted, whether Agent Shea when he was assaulted was acting as a police officer, *and again that is only as to Count 1 and his Honor will instruct you, I submit, as to all the other counts of the indictment it*

[Footnote continued on following page]

POINT IV

The trial court properly instructed the jury as to the elements of Count Three and Thomas' contentions to the contrary are without merit.

Thomas argues that Judge Conner committed reversible error in his charge on Count Three, laid under 18 U.S.C. § 924(c), because he instructed the jury that the predicate felony for conviction on Count Three might be any of those charged in Counts One, Two, Four or Five.* The supposed defect in this charge, Thomas claims, is that since Shea was shot with his own gun after Thomas took it from him, the jury should not have been permitted to find his guilt under Count Three on the predicate felonies charged in Counts Two and Four, the robbery of the gun from Shea. This contention is without merit.

It was undisputed at trial that Thomas shot Shea with Shea's Government-issued service revolver (GX 1; Tr. 510,

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doesn't matter one iota whether Agent Shea was acting in his line of duty or not."

Thomas' brief omits reference to the italicized portion of the above passage. It also ignores the prosecutor's statement at pages 575-576:

> "I have already told you that when Mr. Shea came into the liquor store by reason of the fact that he was a law enforcement officer, and his Honor will instruct you as to the significance of that fact, he was under a duty. The whole purpose of his position as a law enforcement officer was to protect members of the public if they are being subjected to a felony or a violent misdemeanor being committed in his presence. He is just not at liberty to say, well, this is very serious and everything but I just don't want to get involved. It is one of his duties in that position as a *drug enforcement agent* at any time of day or night, and the regulation reads on or off duty, to intervene and to take reasonable and prompt action." (emphasis supplied).

* Reid and Thomas were acquitted on Count Five.

522, 576, 578; Thomas Br. at 3) after covering him with an automatic pistol (Tr. 68) and taking Shea's revolver.

At the time of the defendants' arrest in Ohio, Shea's Government-issued revolver and a long-barreled automatic CO 2 air gun, were recovered (GX 30; Tr. 411, 415-416).

Although the Government had taken the position that the "long-barreled automatic" used to rob Shea's revolver was a firearm and not shown to be the air pistol recovered in Ohio (Tr. 609-610, 642-643), the Court, at the request of Thomas' counsel, gave supplemental instructions to the jury that as to any Count which involved the necessity of finding the use of a firearm, the jury had to find "that the revolver of Agent Shea was involved." (Tr. 647-648).

Thomas's position is predicated on the notion that, having taken Shea's revolver from him, he could not have used it to commit the felonies of robbery of the revolver (18 U.S.C. §§ 2112, 2114) charged in Counts Two and Four. This contention is wholly deficient as a legal proposition and is unsupported by any citation of decisional or statutory authority. Even the textbook on which Thomas places his sole reliance does not support him, because it is said to declare a robbery complete only when "the 'assailant acquires complete possession and control of the property'" (Thomas Br. at 30). However, there is no showing that Thomas had acquired "complete . . . control" of Shea's gun until he made good his escape from the liquor store after shooting Shea in an apparent attempt to immobilize him, perhaps permanently. While the robberies charged in Counts Two and Four may have been "completed" the moment Thomas got his hands on Shea's revolver, these robberies had not been concluded.

> "The escape phase of a crime is not, as appellant apparently argues, an event occurring 'after the robbery.' It is part of the robbery."

United States v. *Von Roeder,* 435 F.2d 1004, 1010 (10th Cir.), *vacated on other grounds,* 404 U.S. 67 (1971). See also *United States* v. *Peichev,* 500 F.2d 917, 919-920 (9th Cir. 1974), and cases cited; *United States* v. *Simmons,* 281 F.2d 354 (2d Cir. 1960).

Moreover, Thomas concedes that, even accepting his theory about Counts Two and Four, the assault charged in Count One was a proper predicate for his conviction on Count Three. However, relying on such cases as *United States* v. *Rodriguez,* 465 F.2d 5 (2d Cir. 1972), he argues that his conviction on Count Three cannot be upheld on this basis because the trial judge's charge permitted use of Counts Two and Four as predicate felonies. *Rodriguez* does not help him, since it is grounded on the unconstitutionality of one of the theories of submission to the jury; no such showing is made here. Similarly, despite Thomas' claims, no showing is made of such an inadequate or incorrect instruction on an element of the crime as to warrant reversal. For here the assault as charged in Count One and as submitted to the jury required a finding that Shea's revolver had been used to commit it, and the jury so found by its verdict. Any deficiency in the instructions was therefore cured by the jury's findings. *United States* v. *Baratta,* 397 F.2d 215, 225-226 (2d Cir.), *cert. denied,* 393 U.S. 939 (1968). Finally, since no exception was taken on the ground now asserted, Thomas is foreclosed from making his present claim. Fed. R. Crim. P. 30.

Thomas also argues that the Court below committed reversible error as to Count Three because at one point in its charge the Court stated that the jury must consider "whether the defendant used a firearm *in connection with* the offense charged in one of the other counts (Tr. 609; Emphasis Thomas's). The gist of Thomas's complaint is that the Court did not employ the precise statutory language that the firearm had to be used *"to commit"* the felony. However, as Thomas acknowledges, the Court read the precise statutory language to the jury (Tr. 608). More-

over, the Court clearly again instructed the jury in the precise statutory language in the paragraph *immediately following* that quoted in defendant Thomas' brief: "And you must further find beyond a reasonable doubt that the defendant in question was using the firearm *to commit* one of the other felonies . . . " (Tr. 609; emphasis supplied). In view of the failure to take an execption to the charge, and in view of the detailed explanation recited above, this language in the Court's charge cannot support a claim of reversible error. Moreover, this Court's rejection of an almost identical claim in *United States* v. *Aloi,* Dkt. No. 74-1220 (2d Cir. decided January 31, 1975) slip op. at 6080-6081, is controlling here.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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I herein acknowledge
receipt of 2 copies
of The Pl's Brief.

J. Boyle.
Legal Aid Soc'y.